Paul Murugesu s/o Ponnusamy (as representative of Nalamah d/o Sangapillay (deceased)) v Cheok Toh Gong & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–424–93
ANUAR CJ (MALAYA), PEH SWEE CHIN AND MOHD DZAIDDIN FCJJ
10 FEBRUARY 1996

Contract *— Terms — Variation — Agreement for sale and purchase of land — Term providing for payment of balance of purchase price within specified time on receipt by purchaser of written notice from vendor — Payment made in absence of written notice by purchaser's son upon receipt of oral notice — Payment was stopped the following day — Whether term of agreement varied — Whether purchaser in breach of agreement — Whether mere knowledge of variation was consent to variation*

Trusts and Trustees *— Trusts — Validity — Trustees held land on trust for beneficiary — Land was sold by vendor to another purchaser earlier on — Vendor terminated agreement with the purchaser because of an alleged breach of agreement by purchaser — Purchaser successfully applied for specific performance — No allegation by trustees that land was bought in good faith for valuable consideration — Whether trust null and void*

By an agreement dated 6 October 1972 ('the agreement'), one Nalamah d/o Sangapillay ('the purchaser') purchase a portion of land from the first and second defendants ('the vendors') for the price of RM9,000. The purchaser paid a sum of RM3,600 to the vendors as deposit. Pursuant to cl 3 of the agreement, the balance of the purchase price amounting to RM5,400 ('the balance purchase price') should be paid by the purchaser to the vendors at the office of the vendors' solicitors within 14 days of the date of the receipt by the purchaser of a notice in writing from the vendors that the main title deed to the land had been issued ('the completion date'). Clause 5 further provided that if the purchaser should fail to pay the balance price on or before the completion date, the agreement would automatically be terminated and the deposit paid would be forfeited by the vendors without notice. The purchaser subsequently caveated the land. On 5 October 1981, the purchaser's son ('the purchaser's son') received a message from an unknown third party that the document of title to the land had been obtained. On the same day, he gave a cheque for RM5,000 to the vendors' clerk. However, on the following day, payment on the cheque was stopped by the purchaser's son. He alleged that his mother asked him to stop payment because she wanted to pay through her solicitors. On 6 May 1982, the purchaser's solicitors wrote to the vendors to inquire if the document of title had been issued pursuant to cl 3. No reply was received to that letter nor to the subsequent reminders issued. The vendors then alleged that the purchaser was in breach of cl 3 of the

agreement, and had thereafter sold that portion of land to the fifth defendant. The third and fourth defendants acted as trustees for the fifth defendant ('the second purchaser'). The purchaser sought specific performance of the agreement, contending that a written notice pursuant to cl 3 should have been sent to her when the document of title to the land was issued. It was also contended that the second purchaser's trust was null and void. The vendors, the second purchaser, and his trustees counterclaimed for the removal of the private caveat entered on the land by the purchaser, arguing that by issuing the cheque on the part of her son, the purchaser had varied cl 3 by doing away with the requirement for a written notice. The trial judge decided in favour of the vendors, the second purchaser and his trustees. The purchaser died in 1985, and the case was continued by her son. The purchaser's son appealed. The issue before the court was whether there had been variation of cl 3, in the manner that both parties had agreed to accept the oral notice (ie the message left by the third party for the son) in place of a written notice.

Held, allowing the appeal:

(1) Both parties to an agreement are entitled to vary any term of the agreement either in writing or orally save in cases, to quote s 92(d) of the Evidence Act 1950, where the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to registration of documents. The agreement here was not of those excepted case (see p 853D).

(2) Where it is sought to prove a variation, not by an express agreement but by a course of conduct, the court must be satisfied that both parties understood the variation and intended to be bound by it (see p 853E).

(3) If the purchaser had asked the son to stop payment of the cheque and that was done the next day, the clear inference was that she had not authorized the son to issue the cheque in the first place. The inference was strengthened by the issue of the cheque on 5 October 1981 and the haste in which the son had gone to see the vendors' clerk and lawyer on the same day. It could be inferred that after the son had informed the purchaser of what had happened, the purchaser had disagreed with such oral notice to be in place of a 14 days' written notice, and had asked him to stop payment on the cheque. The court below had failed to apply its mind to those inferences which would have inevitably arisen from the evidence (see pp 853I and 854A–B).

(4) It was possible that the purchaser's son could have acted as agent for the purchaser. The issue of the cheque by the son was prima facie evidence of some agency and would have been a fairly conclusive act of agency binding the purchaser if she had

subsequently ratified it in writing or by conduct. However, the evidence in the present case pointed to the contrary. The purchaser had told the son to stop payment of the cheque and her solicitors had subsequently written to the vendors on her instructions to inquire if the document of title had been issued 'pursuant to cl 3' (see p 854E–H).

(5) Mere knowledge of a variation is not consent of a variation. From the facts of the case, the purchaser had understood the variation the vendors had in mind, but she had not intended to be bound by it. Consequently, there was no consensus ad idem about the variation of cl 3 and the purchaser could still fall back on cl 3 in its original form. Thus, the purchaser had not been in breach of cl 3 since the obligation to pay the balance price had not arisen prior to the receipt of the written notice as described in cl 3 (see pp 854H and 855E–F); *Coronation Electronics Ltd v Lalchand Mahtani* [1987] 1 MLJ 190 followed.

(6) Accordingly, the order for the removal of the private caveat also could not stand (see p 855E).

(7) As there was no allegation that the second purchaser was a purchaser in good faith and for valuable consideration, the trust in so far as it related to the second purchaser in respect of the land would be declared void and of no legal effect (see pp 856B–C).

[Bahasa Malaysia summary

Melalui suatu perjanjian bertarikh 6 Oktober 1972 ('perjanjian tersebut'), seorang yang bernama Nalamah a/p Sangapillay ('pembeli') telah membeli sebahagian tanah daripada defendan-defendan pertama dan kedua ('penjual-penjual') dengan harga RM9,000. Pembeli telah membayar sejumlah sebanyak RM3,600 kepada penjual-penjual sebagai cagaran. Menurut fasal 3 perjanjian tersebut, baki harga beli sebanyak RM5,400 ('baki harga beli itu') harus dibayar oleh pembeli kepada penjual-penjual di pejabat peguamcara penjual-penjual dalam masa 14 hari dari tarikh penerimaan satu notis bertulis oleh pembeli daripada penjual-penjual bahawa suratikatan hakmilik utama kepada tanah itu telah dikeluarkan ('tarikh penyelesaian tersebut'). Fasal 5 selanjutnya memperuntukkan bahawa sekiranya pembeli gagal membayar baki harga beli itu pada atau sebelum tarikh penyelesaian tersebut, perjanjian tersebut akan ditamatkan secara automatik dan cagaran yang telah dibayar akan dilucut hak oleh penjual-penjual tanpa notis. Ekoran itu, pembeli telah memasukkan kaveat atas tanah itu. Pada 5 Oktober 1981, anak lelaki pembeli ('anak lelaki pembeli') telah menerima suatu pesanan daripada pihak ketiga yang tidak diketahui bahawa dokumen hakmilik kepada tanah itu telah pun diperolehi. Pada hari yang sama, dia telah memberi suatu cek bernilai RM5,000 kepada kerani penjual-penjual. Walau bagaimanapun, pada hari berikutannya, bayaran ke atas cek itu diberhentikan oleh anak

lelaki pembeli. Dia mengatakan bahawa ibunya telah menyuruhnya supaya memberhentikan bayaran kerana dia (ibu) ingin membuat bayaran menerusi peguamcara. Pada 6 Mei 1982, peguamcara pembeli telah menulis kepada penjual-penjual untuk bertanya sama ada dokumen hakmilik telah dikeluarkan menurut fasal 3. Tidak ada jawapan telah diterima terhadap surat itu dan tidak ada jawapan juga yang diterima terhadap peringatan yang dikeluarkan selepas itu. Penjual-penjual kemudiannya mengatakan bahawa pembeli telah memungkiri fasal 3 perjanjian tersebut, dan selepas itu telah menjual bahagian tanah itu kepada defendan kelima. Defendan-defendan ketiga dan keempat bertindak sebagai pemegang amanah untuk defendan kelima ('pembeli kedua'). Pembeli telah meminta pelaksanaan spesifik perjanjian tersebut, dengan berhujah bahawa suatu notis bertulis menurut fasal 3 sepatutnya dikirim kepadanya apabila dokumen hakmilik kepada tanah itu dikeluarkan. Juga dihujahkan bahawa amanah pembeli kedua adalah batal dan tak sah. Penjual-penjual, pembeli kedua dan pemegang amanahnya telah menuntut balas untuk pembatalan kaveat sendirian yang dimasukkan ke atas tanah itu oleh pembeli, dan berhujah bahawa apabila anak lelakinya mengeluarkan cek, pembeli telah mengubah fasal 3 dengan menghapuskan keperluan untuk satu notis bertulis. Hakim perbicaraan membuat keputusan yang memihak kepada penjual-penjual, pembeli kedua dan pemegang amanahnya. Pembeli telah meninggal dunia dalam tahun 1985, dan kes ini telah diteruskan oleh anak lelakinya. Anak lelaki pembeli telah merayu. Isu yang harus diputuskan oleh mahkamah ialah sama ada terdapat variasi fasal 3, dalam maksud bahawa kedua-dua pihak telah bersetuju menerima notis lisan (iaitu pesanan yang ditinggalkan oleh pihak ketiga untuk anak lelaki) sebagai ganti notis bertulis.

Diputuskan, membenarkan rayuan:

(1) Kedua-dua pihak kepada suatu perjanjian adalah berhak mengubah mana-mana terma perjanjian itu secara bertulis atau lisan kecuali dalam kes-kes, meminjam perkataan-perkataan dalam s 92(d) Akta Keterangan 1950, di mana kontrak, geran atau pelupusan harta dikehendaki dalam bentuk tulisan di bawah undang-undang, atau telah didaftarkan mengikut undang-undang yang berkuatkuasa pada masa itu yang berkaitan dengan pendaftaran dokumen. Perjanjian di sini bukan merupakan kes yang dikecualikan itu (lihat ms 853D).

(2) Untuk membuktikan suatu variasi, tidak secara perjanjian nyata tetapi melalui suatu siri kelakuan, mahkamah mesti berpuas hati bahawa kedua-dua pihak telah memahami variasi itu dan berniat diikat olehnya (lihat ms 853E).

(3) Jika pembeli telah menyuruh anak lelaki untuk memberhentikan bayaran ke atas cek itu dan ia telah dilakukan pada hari berikutannya, inferens yang jelas adalah bahawa sesungguhnya dia tidak memberikuasa kepada anak lelaki untuk mengeluarkan

cek itu. Inferens itu dikukuhkan oleh pengeluaran cek itu pada 5 Oktober 1981 dan keadaan tergesa-gesa dalam mana anak lelaki telah pergi berjumpa dengan kerani dan peguam penjual-penjual pada hari yang sama. Boleh disimpulkan bahawa selepas anak lelaki memberitahu pembeli apa yang telah berlaku, pembeli tidak bersetuju bahawa notis lisan demikian digunakan untuk mengganti notis bertulis 14 hari, dan telah memintanya supaya memberhentikan bayaran ke atas cek. Mahkamah di bawah telah gagal menumpukan perhatian pada kesimpulan-kesimpulan yang pasti akan timbul daripada keterangan yang berkenaan (lihat ms 853I dan 854A–B).

(4) Adalah mungkin bahawa anak lelaki pembeli telah bertindak sebagai ejen untuk pembeli. Pengeluaran cek oleh anak lelaki adalah keterangan prima facie mengenai agensi, dan ia mungkin boleh menjadi suatu perbuatan agensi yang agak kukuh yang mengikat pembeli jika dia telah kemudiannya meratifikasikannya dalam tulisan atau melalui kelakuan. Walau bagaimanapun, bukti dalam kes ini menunjukkan sebaliknya. Pembeli telah memberitahu anak lelakinya untuk memberhentikan bayaran ke atas cek, dan peguamcaranya telah menulis kepada penjual-penjual atas arahannya untuk bertanya jika dokumen hakmilik telah dikeluarkan 'menurut fasal 3' (lihat ms 854E–H).

(5) Pengetahuan mengenai variasi semata-mata bukanlah persetujuan untuk suatu variasi. Daripada fakta-fakta kes ini, pembeli telah memahami variasi yang difikirkan oleh penjual-penjual tetapi dia tidak berniat diikat olehnya. Akibatnya, tiada consensus ad idem mengenai variasi fasal 3 dan pembeli masih boleh bersandarkan fasal 3 yang berada dalam bentuk asalnya. Maka, pembeli tidak melanggar fasal 3 kerana kewajipannya untuk membayar baki harga itu tidak timbul sebelum penerimaan notis bertulis seperti yang disifatkan dalam fasal 3 (lihat ms 854H dan 855E–F); *Coronation Electronics Ltd v Lalchand Mahtani* [1987] 1 MLJ 190 diikut.

(6) Ekoran itu, perintah untuk pembatalan kaveat persendirian itu juga tidak boleh dikekalkan (lihat ms 855E).

(7) Oleh kerana tidak ada pengataan bahawa pembeli kedua adalah pembeli suci hati dan untuk balasan bernilai, amanah itu sejauh mana ia berkaitan dengan pembeli kedua mengenai tanah itu, akan diisytiharkan sebagai tak sah dan tanpa kesan undang-undang (lihat ms 856B–C).]

Notes

For cases on variation of terms of a contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2293–2294.

For cases on trusts and trustees, see 12 *Mallal's Digest* (4th Ed) paras 889–1165; [1989] 1535–1541; [1990] 1212–1218; [1991]

2007–2017; [1992] 1714–1722; [1993] 1336–1348; [1994] 2210–2226.

Cases referred to

Benmax v Austin Motor Co Ltd [1955] 2 WLR 418 (HL)
Coronation Electronics Ltd v Lalchand Mahtani [1987] 1 MLJ 190
Cowey v Liberian Operations Ltd [1966] 2 Lloyd's Rep 45
Montgomerie & Co Ltd v Wallace-James [1904] AC 73 (HL)

Legislation referred to

Evidence Act 1950 s 92(d)
National Land Code 1965 s 214

Appeal from: Civil Suit No 385–82 (High Court, Seremban)

Karpal Singh (Karpal Singh & Co) for the plaintiff.
D Krishna (Pretam Singh with him*) (Stanley Ponniah Ng & Soo)* for the defendants.

Cur Adv Vult

Peh Swee Chin FCJ (delivering the judgment of the court): The appeal raises a short but interesting point as to the nature of the evidence required to prove consent to a variation of a term of an agreement, and a summary of relevant facts given below, with first, an agreement dated 6 October 1972 but with only its relevant clauses, to be set out below:

Agreement

An agreement made this 6th day of October 1972 between Cheok Toh Gong, NRIC No 0237732 of 32 Main Road, Lukut, Port Dickson and Chok Yek Ann, NRIC No 3562361 of 2nd Mile Seremban Road, Port Dickson (hereinafter called the vendors) of the one part and Nalamah d/o Sangapillay, NRIC No 3020573 of Cheok Bau Tuan Building Site, 3½ Mile, Seremban Road, Port Dickson (hereinafter called the purchaser) of the other part.

Whereas by an option agreement entered into between Port Dickson-Lukut Rubber Estates Ltd (hereinafter referred to as the said company) and Menjunjong Kebawah Duli Yang Maha Mulia, Yang Di Pertuan Besar Negeri Sembilan of Istana Hinggap, Seremban dated 14 June 1972 (hereinafter referred to as the principal option agreement) the said Mejunjong Kebawah Duli Yang Maha Mulia, Yang Di-Pertuan Besar Negri Sembilan had obtained an option to purchase from the said company the land situated in the mukim of Port Dickson comprising a total area of 56 acres 1 rood 20 poles more or less comprised in Lot 1493 being part of the land held under Certificate of Title No 4007 (hereinafter referred to as the said land).

And Whereas the principal option agreement is expressly subject to the company obtaining from the estate lands board all such consents to this sale

as shall be necessary and to the issue of a separate document of title in respect of Lot 1493.

And Whereas by a deed of assignment entered into between the said Menjunjong Kebawah Duli Yang Maha Mulia, Yang Di-Pertuan Besar Negri Sembilan and S Sathappan dated 26 June 1972, the said Menjunjong Kebawah Duli Yang Maha Mulia, Yang Di-Pertuan Besar Negri Sembilan has assigned his rights title and interest in respect of the said land under the principal option agreement to the said S Sathappan.

And Whereas by an agreement entered into between the said S Sathappan and the vendors dated 8 August 1972 the said vendors have agreed to purchase the said land.

And Whereas the purchaser has inspected the documents mentioned in the recital above and is deemed to have notice thereof.

And Whereas the vendors have agreed to sell and the purchaser to purchase a portion of the said land as is delineated in red on the plan annexed hereto (hereinafter referred to as the said portion of the said land) at the price of RM6,000 per acre which said portion of the said land contains an area of 1.500 acres or thereabouts and is marked Temporary Lot No 10, upon and subject to the terms and conditions hereinafter appearing.

Now it is agreed as follows:

1 In consideration of the sum of RM1,800 (Ringgit Malaysia One Thousand and Eight Hundred only) paid by the purchaser to the vendors by way of deposit being 20% of the purchase price (the receipt of which sum the vendors hereby acknowledge) and the sum of RM1,800 (Ringgit Malaysia One Thousand and Eight Hundred only) to be paid by the purchaser to the vendor's solicitors by way of additional deposit being a further 20% of the purchase price on or before 15 September 1972, the vendors agree to sell and the purchaser to purchase the said portion of the said land with vacant possession except as hereinafter mentioned subject to all conditions of title whether express or implied and all unregistered easements (if any) affecting the said portion of the said land but otherwise free from encumbrances for the purchase price and upon the terms and conditions hereinafter contained.

2 The purchase price of the said portion of the said land shall be the sum of RM9,000 (Ringgit Malaysia Nine Thousand only) and the sums referred to in cl 1 hereof shall be treated as deposits on account of the purchase price.

3 The balance of the purchase price amounting to RM5,400 (Ringgit Malaysia Five Thousand and Four Hundred only) shall be paid by the purchaser to the vendors at the office of the vendor's solicitors Lee Boon Peng & Co, Seremban within 14 (fourteen) days of the date of receipt by the purchaser of a notice in writing from the vendors that the main title deed to the said land held under Lot No 1493 has been issued (hereinafter referred to as the completion date).

4 Provided that the purchaser shall have paid to the vendors the said purchase price in full the vendors shall permit the purchaser to enter into possession of the said portion of the said land 7 (seven) days after the date of completion of the purchase.

5 If for any reason whatsoever other than by reason of the fault of the vendors the purchaser shall fail to pay the balance of the purchase price hereinafter referred to pursuant to cl 3 hereof on or before the completion date this agreement shall automatically be terminated and all the purchaser's rights under it shall be ended and the said deposit and additional deposit referred to in cl 1 hereof shall be irrecoverable by the purchaser and immediately and without notice be forfeited to the vendors and shall be retained by and shall thenceforth belong to the vendors and shall not be refunded to the purchaser in any circumstances and the vendors shall be at liberty to sell or otherwise deal with the said portion of the said land at such price and in such manner and to such person or persons as the vendors may think fit and the vendors shall not be accountable to the purchaser for any profit made on such sale.

...

9 Provided that the balance of the purchase price pursuant to the terms of this agreement shall have been paid by the purchaser the vendors shall upon the issue of a qualified title to the said portion of the said land deliver to the purchaser a valid and registrable transfer of the said portion of the said land free from encumbrances but subject to all conditions of title whether express or implied affecting the said portion of the said land in favour of the purchaser or his nominee or nominees and shall do or cause to be executed and done all such documents acts and things as may be necessary for effectually transferring to and vesting the said portion of the said land into the name of the purchaser or his nominee or nominees.

...

11 The vendors hereby undertake to apply to the government for the subdivision of the said land into separate lots in accordance with the sketch plan annexed hereto and the costs of and incidental to the said application for subdivision up to and including the obtaining of a separate title or titles for the said portion of the said land including all legal expenses and fees or deposits payable to the government and the cost of preparing all necessary plans shall be paid by the purchaser to the solicitors Lee Boon Peng & Co on the date of completion which monies shall be held in trust for the abovementioned fees of the subdivision of the said land.

...

14 Time shall be of the essence of this agreement.

It is to be borne in mind that cl 3 of the above agreement is at the heart of the matter in this appeal arising out of Civil Suit No 385/82 in the court below. The vendors referred to in the above agreement are hereafter called 'the vendors' and the purchaser, 'the purchaser', the temporary Lot No 10, 'Lot 10'. The purchaser had signed the above agreement herself.

There were two plaintiffs in the civil suit in the beginning, the purchaser being the first plaintiff, and one Kathirvelu, allegedly a 'sub-buyer' from the purchaser of ½ interest in Lot 10 mentioned in the above agreement, the second plaintiff. The first and second defendants have been the vendors, the third and fourth defendants, trustees for the fifth

A defendant, to whom the vendors had sold Lot 10 after the alleged breach of contract committed by the purchaser. The third and fourth defendants were appointed as trustees for the fifth defendant, presumably because the titles pursuant to subdivision of the bigger land, ie Lot 1493 described in the above agreement have not been issued. The said Kathirvelu is hereafter B called 'the sub-buyer', and the fifth defendant, 'the second purchaser'.

The claims of the purchaser and the sub-buyer as plaintiffs in the civil suit concerned here have been for specific performance of the above agreement dated 6 October 1972 with the sub-buyer claiming as assignee of ½ of Lot 10 and damages for breach in addition or in lieu etc. The claim of the sub-buyer specifically as against the defendants earlier had been C struck out for having shown no cause of action by the court below on 31 October 1990, from which there has not been any appeal.

The remaining plaintiff, ie the purchaser, claims, in addition, a further prayer that the trust deed dated 24 May 1982, in so far as it relates to Lot 10 being held on trust for the second purchaser be declared null and D void. The claim was heard as an action and was dismissed with costs, hence the present appeal before us concerned solely with the purchaser, and having nothing to do with the sub-buyer's claim. The purchaser, in the meantime, died in 1985, some three years after filing this action. The case was continued by her son, the present substituted plaintiff.

E Reverting to cl 3, specifically, of the above agreement, we now go further into the evidence germane to this appeal.

By the time the civil suit came up for hearing, the purchaser had died. The balance of the purchase price for the purchase of Lot 10 was RM5,400 by October 1981, a month in which certain incidents took place. F The balance of the purchase price is hereafter called 'the balance of price'. Further, there is a counterclaim from the defendants for the removal of a private caveat lodged by the purchaser, and more about it later.

Clause 3 bears repetition here and it requires a notice in writing from the vendors to the purchaser that the document of title to the bigger land G (ie Lot 1493) has been issued, and the purchaser is to pay the balance of price within 14 days from the receipt of it, called the completion date therein, which is on or before the last of the said 14 days.

On 5 October 1981, when the purchaser was still alive, somebody unexpectedly left a message in the house of the substituted plaintiff, ie a H son of the purchaser, (probably the house also of the purchaser), that the aforesaid document of title has been obtained. The son of the purchaser got the message and seemingly all in a hurry, all in the same day, gave a cheque for RM5,000 (RM400 short of the balance of price) to a clerk of the vendors. After giving the cheque, one of the vendors (ie the first defendant) took the son (hereafter called the same way, ie the son) to see I the vendors' lawyer who told the son that he was in the process of transferring the document of title to the names of the vendors in respect of

Lot 1493 (the bigger lot). On the following day, the payment of the cheque which was given to the vendors by the son the day before was stopped by the son on 6 October 1981, the reason not being for lack of fund in his bank account as sufficiency of fund in the account was proved. He denied that his mother was asked to pay on 5 October 1981 the balance of price but that he paid it because of the message of a third party left at his house (vide p 81 of the appeal record). He denied he had breached cl 3 but that he stopped payment of the cheque because the document of title was 'sedang proses pindahmilik', ie in the process of being transferred to the vendors (see p 86). He said (at p 87) that the vendors must send the notice in writing mentioned in cl 3, ie 'tapi mesti hantar notis bertulis'. He said (at p 89) that his mother (ie the purchaser) had asked him to stop payment of the cheque in question because the purchaser wanted to pay through her solicitor. He had seen the lawyer of the vendors who told him as stated above while the vendors (through the message) had said the document of title had been obtained.

On 6 May 1982, the solicitors wrote to the vendors on behalf of the purchaser asking, inter alia, whether the document of title for Lot 1493 had been issued 'pursuant to cl 3' of the sale and purchase agreement in respect of Lot 10. No reply was given by the vendors to this letter. These facts were not disputed. It was not disputed that a reminder dated 26 July 1982 was sent by the same solicitors referring to the letter dated 6 May 1982. The sub-buyer, through the same solicitors, had also the sum of RM5,000 (purportedly) as assignee of ½ interest in Lot 10 from the purchaser. The sub-buyer's cheque was returned by the vendors.

The learned trial judge on the material parts of the evidence set out above, concluded that the purchaser was in breach of cl 3 by not paying the balance of price of RM5,400, clearly and knowingly ('terang dan sedar'); because clearly and knowingly, she varied cl 3 of the agreement dated 6 October 1972 by dispensing with ('mengenepikan') the provision of written notice as provided in cl 3. We might just as well mention that the civil suit was conducted and judgment written wholly in Bahasa Malaysia.

The conclusion was challenged before us as being erroneous, and it was the central issue, according to learned counsel for the purchaser.

Learned counsel submitted to the effect that the document of title to Lot 1493 (the bigger lot) was issued in 1978, and a written notice in pursuance of cl 3 should have been sent. It was not. The son came to know about the issue of the document of title through a third party and he gave the cheque. He submitted further that 'from the look of it', 'the mother' (the purchaser) was not consulted when the son gave the cheque as it was common ground that the cheque was paid on the same day the son received the message. To give an oral message that the document of title had been issued, was not the same as giving the written notice giving 14 days' time. The messenger (the sender of the message) was not a donee of a deed of power of attorney of the vendors. Clause 3 was not fulfilled.

A The gist of the submission of learned counsel for the vendors and other defendants was that by issuing the cheque on the part of the son, the purchaser varied cl 3 by doing away with the written notice. Payment on the son's cheque was stopped because the document of title for Lot 1493 was suspected to be unissued. There was no request for the written notice B until the letter of the purchaser's letter dated 6 May 1982. He referred further to p 86 of the appeal record about the evidence of the son that he was told by the mother to stop payment because the purchaser wanted to pay through her solicitor.

In the light of the evidence and submissions highlighted above, this C court's duty would be to see whether the conclusion of his Lordship in the court below could be sustained, ie that there was variation of cl 3, and that the purchaser was in breach of cl 3 as varied in the manner that both parties had agreed to accept the oral notice in place of written notice described in cl 3, viz the oral message left in the house of the son by someone on behalf of the vendors unexpectedly on 5 October 1981.

D In the first place, both parties to an agreement are entitled to vary any term of the agreement in writing, or orally, where oral evidence of such variation can of course be given, to quote s 92(d) of the Evidence Act 1950, 'save in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the E law in force for the time being as to registration of documents'. The above agreement is not of those excepted cases.

It is important to remember that when it is sought to prove a variation, not by an express agreement but by a course of conduct, that both parties have understood the variation and intended to be bound by it. F In the instant case, the variation in question was sought to be proved by a course of conduct, vide the evidence set out earlier, and the court would have to be satisfied that the variation to cl 3 in question was both understood by the purchaser and the vendors, and that they all intended to be bound by it. What the court would have to be so satisfied would depend on the surrounding circumstances.

G The more weighty circumstances of this question are as follows. When the son got to know the oral message, that the document of title had been issued, he wrote out his cheque for RM5,000 and went to see the clerk and the lawyer of the vendors on the same day and all this shows considerable initiative and zeal of the son. At that time, the purchaser was H still alive. It is not certain as to whether the son, aged 62 at the time of giving evidence was staying with the mother. He told the court that his mother (afterwards) on or before the following days asked him to stop payment of the cheque and she wanted to pay the balance of price through her solicitors. This part of the evidence was not challenged. If the mother I had asked the son to stop payment on the cheque, and that was really done the next day, ie on 6 October 1981, the clear inference is that she had not

authorized the son to issue the cheque in the first place. The inference is strengthened by the issue of the cheque on 5 October 1981 and the hurry in which the son went to see the clerk of the vendors and thence, the lawyers of the vendors all on the same day, ie on 5 October 1981. It can be inferred that after the son informed the purchaser, ie his mother, of what had happened, his mother disagreed with such oral notice to be in place of a 14 day's written notice, and asked him to stop payment on the cheque, and this even when the son could have told her that the document of title of Lot 1493 had been available and was in the process of being transferred to the vendors. With great respect, the court below had failed to apply its mind to these inferences, which would have arisen inevitably from the evidence, given the issue in hand at the trial.

Speaking of inferences from facts, it should be borne in mind that there is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found. Earl of Halsbury LC's dictum in *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73 (HL) at p 75 in connection with such inferences from facts specifically found that 'the original tribunal is in no better position to decide than the judges of an Appellate Court', was again adopted with approval by the House of Lords in *Benmax v Austin Motor Co Ltd* [1955] 2 WLR 418 (HL).

The fact that the son who paid the cheque was the son of the purchaser seems, at the hearing, to have a great deal of assumed importance and requires some comment from us also.

It is certainly possible that the son could act as agent for his mother, ie the purchaser. To lay down however as a proposition of law that a son, doing any act in connection with his parent's business, would bind his parent as principal would be too far off the mark. It all depends also on the circumstances proving or disproving agency, including hypothetically, eg a rather telling incident that the parent has held out his son earlier as his agent to a third party in question in connection with the contract in question. The issue of the cheque by the son in this appeal is prima facie evidence of some agency and will be a fairly conclusive act of agency binding his mother if the son's mother, ie the purchaser, has ratified it subsequently in writing or by conduct. However evidence in this case points to the contrary, ie to a case of non-ratification or repudiation, ie the evidence that the purchaser had told the son to stop payment of the cheque and that was done the next day and further that the solicitors had subsequently written on her instructions to inquire from the vendors if the document of title had been issued 'pursuant to cl 3'.

It is to be borne in mind also that mere knowledge of a variation is not consent of a variation: see *Coronation Electronics Ltd v Lalchand Mahtani* [1987] 1 MLJ 190 at p 197 per Chan Sek Keong JC (as he then was).

Thus, in *Cowey v Liberian Operations Ltd* [1966] 2 Lloyd's Rep 45, which can throw light on the nature of evidence required to prove consent to a variation of a term of agreement, the court held there that it was not competent for a party to a contract to vary the terms of the contract just by passing out a circular or notice unilaterally to the other party. In that

A case, plaintiff, an engineer, was engaged on the basis of a three months' notice of termination of service. About three months later after his employment, a circular was passed to all employees including the plaintiff for them to initial it. All employees including the plaintiff initialled it, and it had provided, inter alia, that their employment would be on a monthly B basis unless otherwise agreed. Notwithstanding his initialling it, the court gave judgment to the plaintiff holding, on an alternative but conclusive ground, that it was not competent for one party to vary it by passing such circular. By the way, because of the plaintiff initialling it, we are bound to say that the cited case is a borderline case.

C In the light of the evidence analysed above, we hold more probably, that the son had on 5 October 1981 issued the cheque in question, then visited the clerk of the vendors, and subsequently visited the vendors' lawyer without first consulting his mother, ie the purchaser, and we hold further that when the mother was consulted later that day after the visits, more probably she had refused to be bound by such variation of cl 3 and D asked her son to stop payment on the cheque instead, on the following day.

We are of the view that the purchaser had understood the variation the vendors had in mind but she had not intended to be bound by it.

E Consequently, there was no consensus ad idem about the variation of cl 3 of the agreement, and the purchaser could still fall back on cl 3 in its original form and it goes without saying at the same time, that the purchaser had not been in breach of it, for the obligation to pay the balance of price had not arisen prior to the receipt of the written notice as described in cl 3. This court will make the necessary order to do justice between the F parties later, for there remains another matter for disposal.

The defendants have counterclaimed an order for the removal of the purchaser's private caveat bearing Jilid No 52, Folio 37 the date of 12 August 1982, and such order was granted by the court below.

G In consequence of our finding for the purchaser here and now, the order for the removal of the private caveat cannot stand.

In connection with any order this court will make; up to the date of trial, no sub-divisional document of title had been issued in respect of Lot 10, but the document of title of Lot 1493 of which Lot 10 forms a part, had been registered in the names of the vendors. Under the sale and H purchase agreement in question, the area of Lot 10 is 1.5 acres so that any consequential order or direction for executing a registrable transfer of Lot 10 will refer to the 1.5 acres. It is envisaged that under s 214 of the National Land Code 1965, only the whole but not part only of any alienated land shall be capable of transfer, but the vendor can transfer an I undivided share of the document of title covering Lot 1493 representing the 1.5 acres of Lot 10 to the purchaser and the rest of Lot 1493 to themselves at the same time, so that the undivided share of Lot 1493 in respect of Lot 10 will be registered in the name of the purchaser. The fractional figure for the said undivided share representing Lot 10 will be

determined by consent of both parties, failing which, the Timbalan Pendaftar of the High Court at Seremban will determine the same.

A few words also about the second purchaser, ie the fifth defendant, and his trustees, ie the third and fourth defendants; they have all been represented by the same solicitors for the vendors, ie the first and second defendants. A common statement of defence was filed for all of them, in which there was not even an allegation that the fifth defendant was also a purchaser of Lot 10 in good faith and for valuable consideration in answer to the allegation about the null and void declaration of trust by the third and fourth defendants for the fifth defendant. Further, the fifth defendant did not even give any evidence at all.

Finally, we allow the appeal and the order of the court below made on 14 July 1993 is hereby set aside with costs here and below and we further make an order:

(1) that the part of the deed of trust or declaration of trust made on 24 May 1982 in so far as it relates to the fifth defendant, in respect of grant for land 17067 for Lot No 1493 Mukim of Port Dickson is hereby declared void and of no legal effect;

(2) that specific performance of the sale and purchase agreement dated 6 October 1972 in respect of 1.5 acres, as described by the parties therein be granted and carried out as follows;

(3) that the appellant do pay to the first and second defendants within two weeks from the date hereof a sum of RM5,400 free of interest;

(4) that upon payment of the aforesaid RM5,400 and within 14 days thereafter, the first and second defendants do execute a valid and registrable transfer in respect of 1.5 acres out of 56 acres, 1 rood and 20 poles comprised in Grant for Land No 17067 (formerly known as Certification of Title No 4007) for Lot No 1493, Mukim of Port Dickson, that is to say, an undivided share of Lot 1493 representing 1.5 acres out of the total area of 56 acres, 1 rood and 20 poles;

(5) that a fractional figure for such undivided share representing the 1.5 acres be determined by the consent of the parties herein, in default, the same be settled by the Timbalan Pendaftar of the High Court at Seremban, with an appeal therefrom to the judge in chambers pursuant to O 56 of the Rules of the High Court 1980;

(6) that there be liberty to apply generally to this court in connection with the implementation only of this order, when it is considered by any of the parties to be absolutely necessary; and

(7) that the respondents do pay costs, here and below.

Order accordingly.

Reported by Loo Lai Mee